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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 854

J. T. LOTT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, J. T. Lott, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above entitled case.

OPINION OF THE COURTS BELOW

The judgment and sentence of the United States District Court for the Northern District of Texas, Fort Worth Division, was entered on the 25th day of March, 1955. The District Court's judgment is not reported but is printed in the Record filed herewith.

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the trial court, was filed on March 14, 1956. The opinion is not yet reported, but is set out in full in the Appendix hereto at pp. 19-25.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered on March 14, 1956. This Petition for Certiorari is filed within thirty days of the entry of said judgment.

The jurisdiction of this Court is invoked under Title 28, U.S. Code, Sec. 1254(1) and Rule 19(b) of the Rules of this Court.

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not it was error for the trial judge to admit into evidence prejudicial hearsay testimony against the petitioner?

2. Whether or not it was error for the trial judge to certify the veracity of an impeached government witness?

3. Whether or not the defendant was deprived of a fair trial by the erroneous introduction of evidence implicating him by the statement of an alleged co-conspirator, not made in furtherance of the conspiracy?

4. Whether or not the court erred in charging the jury that it might find the petitioner guilty, irrespective of sufficient proof?

STATUTES INVOLVED

The conviction herein took place under the provisions of Sec. 371, Title 18, U.S. Code, the relevant provisions of which are reproduced in an Appendix hereto.

STATEMENT OF THE CASE

The petitioner, together with three alleged co-conspirators, was charged in Count 1 of a Five Count indictment with conspiring to commit certain narcotic offenses, violative of Sections 2553(a), 2554(a), 2591(a), and 2593(a), of Title 26, U.S. Code, all in violation of Sec. 371, Title 18, U.S. Code. Count 4 of the indictment, a substantive count, was dismissed in the trial court prior to the trial. Counts 2, 3 and 5 were substantive counts in which the petitioner was not charged. The jury found petitioner guilty of the conspiracy alleged. Petitioner was sentenced to imprisonment for a period of five years. The Court of Appeals affirmed the conviction on March 14, 1956.

The conspiracy count alleged seventeen overt acts. For the convenience of the Court, we have included the entire salient facts relating to the conspiracy count as Appendix C hereto, should the Court desire additional details without reference to the Record.

Overt Acts 1 to 6 alleged the commission of a series of offenses committed by Lott and his co-conspirators (R. 3-4). Proof of the commission thereof depended entirely upon the testimony of informer witness Floyd Luke Watkins.

Overt Act 5 (R. 4) was not proved (Appendix B, p. 28).

Overt Act 7 (R. 4) was never proved (Appendix B, p. 28).

Overt Acts 8-17 (R. 4-5) depended on the testimony of the witness Watkins. These acts involved alleged sales of narcotic substances to the witness Watkins by petitioner's alleged co-conspirator, Yank Reed (Johnnie Lee Reed). Reliable witnesses corroborated Watkins to the extent

that Watkins was seen to enter and leave Reed's house at or about the time of the alleged transactions with Reed, and as to Overt Acts 8, 9, 10, 11 and 12, these witnesses placed petitioner in the vicinity of Reed's house. As to none of overt acts 1-7, inclusive, or as to act 12, was a narcotic substance proved by competent testimony to have been transferred.

As to Overt Acts 13 to 17, inclusive, there was testimony by a police officer that he listened via radio to the signal broadcast by a hidden transmitter carried by the witness Watkins. That officer testified to conversations carried on between Watkins and what he supposed were petitioner's co-conspirators regarding narcotics. Petitioner, though never present at any of the times the transmitter was in operation, figured prominently in the broadcast as a supplier of narcotics.

The evidence as to other counts did not apply to the petitioner.

Watkins was thoroughly impeached in the following particulars:

As to Overt Acts 1, 2 and 3, alleged to have occurred at 817 East Magnolia Street in Fort Worth (R. 3), an unimpeached defense witness demonstrated that those premises did not exist at the time of the alleged commission of the offenses therein (R. 505-6, 511-512). (See also defense Exhibit 1, R. 507-510). Watkins testified he visited the structure alleged in the indictment as the scene of crime at the times of the supposed offenses (R. 55, 58, 62, 98). Watkins testified frequently in the course of the trial to the use of narcotics (R. 70-74, 81, 85, 90, 91, 94). He testified he stopped using narcotics late in 1954 (R. 120, 127) having been cured of their use late in 1953 (R. 139). Defense witness Giles, the night jailer at the jail in which Watkins was

confined, testified that Watkins told him in effect that he had been paid to fabricate for the government (R. 516-525). Watkins denied the obvious implications of statements contained in letters he wrote while in jail (R. 133-135) which implications were damaging to his testimony. Watkins admitted becoming a government agent to get out of jail (R. 121). He admitted he was a panderer (R. 97). Watkins admitted that as to Overt Acts 14, 15 and 17, he did not, in a previous trial, mention petitioner's name (R. 103, 106, 108). That he had previously been arrested for selling narcotics (R. 127) and that he had rehearsed his testimony (R. 126).

Petitioner, in his own behalf, denied any narcotics transactions, explaining his proximity to his alleged co-conspirators by the fact that they were people who worked for him on his farm (R. 545, 552-553) and that he saw another alleged co-conspirator when he took his laundry to her house (R. 534, 535, 556). He did not deny being in the area in question when government witnesses testified he was there (R. 557).

REASONS FOR ALLOWANCE OF THE WRIT

I.

Petitioner was deprived of a fair trial because of the admission into evidence against him of the hearsay statements of alleged co-conspirators made out of his presence, there being no foundation for the admission of such testimony.

Our brief statement of facts discloses that the government's case was based upon Watkins' testimony. (See also Appendix C, pp. 27-36). The situation was acknowledged by the reviewing court below. (See Appendix A, p. 20). Our statement of facts further discloses that Watkins was a severely impeached witness.

In order to convince the jury that Watkins' testimony was true, it became desirable to corroborate his testimony wherever possible. We do not contend that a conviction upon Watkins' testimony alone could not have been sustained as a matter of law. But it was the job of the government to convince the jury of the truth of that testimony. Evidence which tended to corroborate the oft impeached Watkins was thus of great importance to the government in doing its job, else Watkins might go unbelieved. If such corroborative testimony were improperly admitted, petitioner would accordingly be erroneously prejudiced thereby.

The only corroborative evidence offered by the government which directly linked petitioner to a conspiracy, was improperly admitted heresay.

Commencing with Overt Act 13, Watkins was supplied with a hidden radio transmitter which he carried with him to what he claimed were meetings with petitioner's alleged co-conspirators. There he engaged persons whom he claimed were petitioner's alleged co-conspirators in conversations relating to narcotics transactions involving the petitioner. (Appendix C. pp. 33-36). The Record discloses that at no time when Watkins was equipped with a radio, was the petitioner present. Watkins alone supplied the identification of the persons with whom he claimed to have discussed the several transactions.

The transmitter broadcast to a receiver monitored by one Hopkins, an officer of the Fort Worth, Texas, police force. The Record discloses that Hopkins did not visually observe the participants in the monitored conversations at the time of the supposed broadcasts. (R. 200, 219, 232, 251, 261, 264, 270). Objection was made on *voir dire* to the hearsay character of Hopkins proposed testimony, Hopkins having testified on *voir dire* that he recognized the participants in the conversations from the fact that he knew Watkins' voice (R. 255) and from the fact that when Watkins addressed the persons with whom he spoke by the names of various co-defendants, persons so addressed responded to Watkins (R. 254).

His *knowledge* of the voices in question was summed up by his testimony:

> "... I could recognize those boys' voices, but I would not be able to swear it was them." (R. 254).

The Court ruled that the evidence of the wireless communications as disclosed by Hopkins' testimony was admissible, saying:

> "I am not clear whether he testified that he could recognize the testimony of some or one of the persons engaged, for instance, Luke Watkins; if he recognized Luke Watkins, or recognized Johnnie Reed, why, I

> think then that part of the testimony would be admissible, in the first place, because Johnnie Reed is a party, and the other place, if he recognized Floyd Watkins, Floyd could identify the one that was with him, and if he can do neither, then I think the testimony should go out." (R. 257).

The prosecutor responded that the witness had definitely identified Floyd Watkins' voice. The court replied: "We will admit it." (R. 257).

The testimony was thus admitted because Hopkins testified he could recognize Watkins' voice. The prosecutor at the time of trial, made no additional claim. The court admitted the testimony in response to the prosecutor's contention. We are left with no alternative, but that the testimony was admitted on the basis of Hopkins' recognition of Watkins' voice.

The supposed corroboration generated by this testimony is specious. The identification of Watkins' immediate audience derived from Watkins. If what was sought thereby was to corroborate Watkins, and surely nothing more than that can be claimed as a purpose of Hopkins testimony, then it appears that Watkins was permitted to corroborate himself.

Watkins was the volume whose capacity for truth was to be measured. It would amount to no test at all to authenticate the weight of an alleged one-pound body by balancing an unknown quantity in the other pan, thereafter using the latter to demonstrate that the first weighs one pound. No more can a body be used to measure its own weight than an impeached witness can be used to measure his own veracity.

It is impossible to say that the verdict of the jury did not result from the ephemeral "proof" elicited from

Hopkins. To the contrary, petitioner's participation in an actual offense was based upon the impeached Watkins' testimony. Can it be said with any certainty that Watkins' testimony was not rendered acceptable to the jury by virtue of the supposed weight of the improper corroboration?

The wireless corroboration was of particular significance in buttressing Watkins' testimony, in view of the fact that the only other corroboration of that testimony, so far as petitioner was concerned, was corroboration which merely placed him in the vicinity of the commission of the offenses.

We do not take issue with the holding in *On Lee* v. *United States,* 343 U.S. 747, admitting radio conversations. In *On Lee,* however, this Court was at pains to point out that the narcotic agent using the receiving set knew that the undercover agent was talking to the defendant. He could see him talking to the defendant (*On Lee,* p. 749).

We respectfully submit that the question which we present in this part of our petition is of considerable importance in the administration of federal criminal law. The question is likely to become of greater importance in view of the government's increasing use of technological improvements of various kinds for the detection and suppression of crime. Unless appropriate limitations be placed upon the use of such instruments, infringement of the rights of accused persons will be violated in the course of trial, the situation here.

II

The Trial Court erred in guaranteeing the veracity of an impeached government witness

As previously noted, the witness Watkins was severely impeached. In the course of his cross-examination the defense sought to discover his interest in convicting the de-

fendants in the fact that his brother was a federal prisoner (R. 109) and might enjoy special consideration in return for fabricated testimony by Watkins (R. 111).

Cross-examination as to the existence of a motive to fabricate along the line indicated was suppressed by the court (R. 112). In the course of limiting the cross-examination, the Judge observed:

> "The government of the United States is not supposed to oppress a man's brother or to coerce him into . . . saying that which is untrue. (R. 110) . . . The only way he would aid his brother is to give testimony that would be helpful to the government, and if it was untrue, the government would be a party to it . . . I do not think the government, truly speaking, is under any obligation to this man that would cause them to show a different consideration to a prisoner, even though he was his brother . . . Maybe I hold my government too high but that is the way I look at it." (R. 111) (Emphasis supplied).

The court then instructed the jury that Watkins' brother's confinement in a federal prison could not affect Watkins' testimony (R. 113-114). We urge that the Court's remarks constituted a deep foray into the province of the jury. The court in effect advised the jury that if Watkins' testimony were untrue, the government would be a party to his perjury and he, the Judge, holds his government in such esteem as not to believe that the government could use false testimony.

The result of the court's comment was to commend to the jury that if the government were satisfied that one of its witnesses was worthy of belief that he, the Judge, was similarly satisfied owing to his high regard for his government.

In *Quercia* v. *United States,* 289 U.S. 466, 471-472, this Court criticized the remarks of a trial judge in calling the

jury's attention to the defendant's hand wiping as a sure-fire indication of lying. The court pointed out:

> ". . . He did not review the evidence to assist the jury in reaching the truth, but in a sweeping denunciation repudiated as a lie all that the accused had said. . . . Nor do we think that the error was cured by the statement of the trial judge that his opinion . . . was not binding on the jury . . . His definite and concrete assertion of fact, which he had made with all the persuasiveness of judicial utterance as to the basis of his opinion, was not withdrawn." (pp. 477-472).

We invite the attention of the court to the fact that the Judge here not only indicated that he believed the witness Watkins, but stated that there were collateral factual guarantees of Watkins' veracity owing to the fact that the government used him as a witness.

We urge that the remarks of the trial judge complained of herein deprived the defendant of his right to a fair trial as that precept is laid down in *Krulewitch* v. *United States,* 336 U.S. 440; *Starr* v. *United States,* 153 U.S. 614; *Quercia* v. *United States,* 289 U.S. 466 and *Bihn* v. *United States,* 328 U.S. 633. We respectfully submit that the error of which we complain herein requires review by this Court in the interest of proper administration of federal criminal justice.

III

The defendant was deprived of a fair trial by the improper introduction into evidence against him of a statement of an alleged co-conspirator not in furtherance of a conspiracy.

The indictment alleged as Overt Act 7 that defendant Pierce purchased One Hundred Dollars worth of morphine from defendant Lott on October 23, 1952 (R. 4).

In support of Overt Act 7, narcotic agent Agathangelou testified that on October 23, 1952, petitioner's co-conspirator, the defendant Pierce, visited the Forth Worth narcotic office and there said he would buy narcotics from petitioner Lott; that Pierce was given money, but that nothing happened (R. 304-305). The witness did not know whether or not a purchase were made (R. 337). Government agent Johnson testified that he saw Pierce on the date in question (R. 384-385). Petitioner's attorney then objected to the testimony on the ground that such conversations by Pierce were not in furtherance of the conspiracy (R. 385). The prosecutor then remarked:

> "That objection may be well made, Your Honor . . . We withdraw the question, he may be right on that objection." (R. 386).

It is apparent from the portions of the Record noted, that the evidence in question was offered for the purpose of prejudicing petitioner's right to a fair trial. The government was fully aware of the fact that its own witnesses could not substantiate the Overt Act charged. Nevertheless, the government proceeded to offer proof thereof, the only effect of which could be to deprive the petitioner of a fair trial. The intention of the prosecutor is reflected in the government's withdrawal of the question when challenged.

An almost identical situation resulted in the reversal of *United States* v. *Sansone*, 2 Cir., 206 F. 2d 86. In *Sansone*, a narcotic agent testified that a man indicted as a conspirator told him, during the existence of the conspiracy, that he knew of a mob of traffickers led by Orsini and Spirito (his alleged co-conspirators) and that Sansone was a courier for the mob. The court said:

> "Such statements by Gannini were not made by a conspirator in furtherance of the conspiracy charged in the indictment and were inadmissible." (p. 88).

The matter of which we complain herein is, notwithstanding the length of the Record, of signal importance because the testimony by Agathangelou and Johnson as to Overt Act 7 is absolutely the only evidence in the entire Record in which an unimpeached and reliable witness *identified* an alleged co-conspirator as a party making statements implicative of the petitioner Lott.

After sustaining the objection to the testimony, the court took no steps to ameliorate the gross intentional error committed by the prosecutor. In *United States* v. *Sansone,* 2 Cir., 206 F. 2d 86, 88, the court said:

> "When it cannot with reasonable certainty be shown that the harm has been undone, a reversal is required."

Here, nothing was done to alleviate the harm.

The importance of our complaint was emphasized by this Court in *Blumenthal* v. *United States,* 332 U.S. 539, 551, wherein the Court held that reversal is required if it is even doubtful that declarations have been improperly received against co-conspirators.

The Court of Appeals below declined to review the error complained of herein. We submit that under the holdings of *Blumenthal, supra,* and *Sansone, supra,* the error is plain error, available for review under Rule 52(b), Federal Rules of Criminal Procedure, if defense counsel's objection was inadequate, which we dispute.

We respectfully urge that the Court of Appeals for the Fifth Circuit has failed to follow the applicable decisions of this Court, and, by its election not to review the point, is placed in conflict with the Court of Appeals for the Second Circuit. Accordingly, we ask the Court to review the error complained of in this portion of our petition.

IV

The Court erroneously charged the jury that it might determine the guilt or innocence of petitioner in the absence of proof or on the basis of excluded testimony.

The court charged the jury:

> ". . . the government has set forth some 17 overt acts in support of Count I . . . Now if you find . . . that the defendants . . . formed the conspiracy . . . then it is not necessary for the government to prove all of the 17 overt acts, but if the government proves *one of them* . . . it will be sufficient to support a conviction." (R. 631-632, Emphasis supplied).

This charge failed to account for the fact that the Judge had agreed that he would not consider proof as to Overt Act 1 as an appropriate matter to go to the jury (R. 575-576) yet under the instruction, if the jury were satisfied as to Overt Act 1, conviction could follow.

There was a failure of proof as to Overt Acts 5, 6 and 7. Hence the jury ought not to have been permitted to return a guilty verdict based on a finding that defendants performed the misdeeds alleged in one of said Overt Acts.

Specific objection was made subsequent to the charge that there was insufficient evidence to submit the question raised by the allegations of Overt Act 7 to the jury (R. 636). Overt Act 7 alleged that Pierce bought morphine from Lott (R. 4). The evidence pertaining to the act occurs at R. 304-305, 337. No proof of any kind was offered that such a purchase was made. Clearly, the jury ought not to have been instructed that it could predicate a guilty finding upon the unproved allegations contained in Overt Act 7.

Overt Act 5 (R. 4) charged that named persons went to San Antonio, Texas, to buy narcotics and did buy nar-

cotics there. The only evidence offered showed that defendant Reed told Watkins he was going to San Antonio to get dope (R. 69-70) and that Watkins did not know if Reed did go there (R. 115-116). Agent Johnson testified that he merely saw Reed and Shaw in San Antonio (R. 384). There was no testimony as to any narcotic transaction in San Antonio. Overt Act 5 should have been withdrawn from the jury's consideration.

Overt Act 6 (R. 4) charged a sale early in 1951, but Watkins testified as to that Overt Act that the sale was made to him in 1952 (R. 70). That variant proof should have been withdrawn from the jury's consideration.

We urge that it was plain and manifest error for the court to charge the jury that it might return a guilty verdict on the basis of such evidence, and is subject to review under Rule 52(b) Federal Rules of Criminal Procedure.

Lest the Court consider this claimed error insignificant in view of the length of the Record, we would remind Your Honors of the variant and sketchy proof as to many of the Overt Acts. Acts 1, 2, 3, 6 and 12 alleged narcotic transaction in which no proof was offered as to the narcotic character of the substance allegedly transferred, save upon the testimony of the witness Watkins, who was not an expert. The Fifth Circuit in *Shurman* v. *United States,* 219 F. 2d 282, 292, recognized that it takes an expert to make the identification. Illustrative of the confusion engendered: in Overt Act 15, a sale of morphine was alleged, but if Hopkins be given credence the substance transferred was cocaine (R. 267). We refer to this instance as indicative that Watkins' testimony as to what was transferred to him, was suspect for want of expert verification.

Overt Act 10 was sketchily proved, agent Johnson testifying that he received ten *tablets* from Watkins (R. 405). The chemist identified ten *capsules* (R. 492). Was the exhibit confused with that in another case?

In Overt Act 11, agent Johnson said Watkins gave him *four* capsules (R. 408-409). The chemist, however, testified that the exhibit consisted of *five* capsules (R. 492). Whence the extra capsule?

We have alluded above (Pet. p. 5) to the remarkable coincidence that petitioner was never present when Watkins wore his radio transmitter.

Further, on the only occasion when the agents saw petitioner enter Reed's house at a time Watkins was present, that also was the only occasion when Watkins emerged from the house without an exhibit for the agents. This, notwithstanding Watkins' claim that at that time he got dope from Lott via Reed (See Testimony as to Overt Act 12, Appendix p. 32).

We call these matters to the Court's attention to illustrate that the very nature of the proof offered here suggests the necessity that the trial judge have exercised the greatest diligence to see that only those matters went to the jury for which there was evidence. In *Krulewich* v. *United States,* 336 U.S. 440, the Supreme Court was moved to hold:

> "*There should be no straining to uphold any conspiracy conviction* where prosecution for the substantive offense is adequate and the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction." (Emphasis supplied)

We respectfully submit that the question which we place before the Court under this portion of our petition raises grave questions in the proper administration of federal criminal justice. We urge this Honorable Court to review this question as constituting plain and manifest error, notwithstanding the refusal of the Court of Appeals for the Fifth Circuit to grant review.

CONCLUSION

For the reasons set forth herein, we respectfully submit that the Petition for Certiorari ought to be granted.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 15648

J. T. LOTT,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(March 14, 1956.)

Before RIVES, TUTTLE and CAMERON, Circuit Judges.

CAMERON, Circuit Judge: This appeal is from a second trial of the appellant, John T. Lott on an indictment charging him in one court (along with Johnnie Lee Reed, Larry Pierce, Doris Jean Miller and Joe Melvin Shaw) with conspiring to sell and transfer, not in pursuance of a written order on a form provided for that purpose by the Secretary of the Treasury, certain un-

stamped narcotic drugs in violation of Sections 2553(a), 2554(a), 2591(a) and 2593(a) of 26 U.S.C.A. 1939.[1] The chief question before us here is whether the Court below erred in allowing a Fort Worth, Texas, City Detective, Herbert Hopkins, to testify as to alleged conversations by the co-conspirators overheard by him through a radio receiving set.

Much of the evidence in support of the Government's case was furnished by testimony of Floyd Watkins, a confessed narcotic addict and an informer or special agent for the Narcotics Bureau. He was substantially corroborated by those narcotic agents and city detectives who directed his purchases and other activities as a special employee. However, a large part of the appellant's case was an attempt to impeach Watkins by attacking his credibility and showing his unreliability and motives to fabricate.

The first count of the indictment charged seventeen overt acts as the basis of the conspiracy alleged. In several of these Lott was not connected; in others he was shown to have been present and actually to have participated in the transfer of dope. With respect to most of the overt acts, however, evidence of appellant's participation was circumstantial. In three instances it

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[1] A conviction of appellant on two counts of the same indictment was reversed by this Court because of prejudicial testimony by a Government witness concerning which the Government counsel had been warned, and certain unjustified remarks by the trial Court. **Lott v. United States**, 5 Cir., 1955, 218 F. 2d 675. Before the commencement of the second trial, from which this appeal was taken, the trial Court dismissed the fourth count of the indictment which charged Lott with a substantive offense, and appellant was thereafter tried only upon the remaining conspiracy count.

was shown that Lott's car was in the neighborhood where the transfer took place and circumstances indicated that he was there for the purpose of supplying and that he actually did supply his co-conspirators with the drugs which were sold on these occasions. Evidence of appellant's connection with four of the overt acts was through testimony of Watkins concerning conversations he had with co-conspirators named in the indictment, the statements of these co-conspirators being to the effect that John Lott was the source of the narcotics sold to Watkins. On these four occasions Watkins was furnished with a radio "bug" which was strapped to his body. Through this radio transmitter Detective Hopkins was able to hear the conversations which took place at the time of the sales, and was able to corroborate the testimony of Watkins.

The agents or officers recorded the radioed conversations, but technical imperfections made fruitless the attempt which was made to play the records for the jury. The detective was thereupon allowed to testify as to what he heard while monitoring the conversations.

Appellant contends, first that the Court committed reversible error in allowing Detective Hopkins to relate the contents of the conversations transmitted through the radio worn by Watkins and heard by him over the loud speaker. It was argued that this was inadmissible hearsay evidence since Hopkins could not, by his own knowledge, identify the voices heard by him.

Admissibility of incriminating statements by a defendant overheard by a federal officer through radio equipment like that used here was approved in *On Lee* v. *United States*, 1952, 343 U.S. 747, and this point is not put in issue here. Both parties agree that a conviction may rest

upon uncorroborated testimony of an informer. It is appellant's real position, therefore, that the Government, in an attempt to bolster its informer witness, was allowed to introduce inadmissible and prejudicial evidence. With this we are unable to agree. Statements by a conspirator made in the course of and in furtherance of a conspiracy are admissible against all conspirators. *Montford* v. *United States*, 5 Cir. 1952, 200 F.2d 759; *Shefano* v. *United States*, 5 Cir., 1936, 84 F.2d 513. The statements in dispute made by Lott's cohorts, Reed, Pierce, Miller and Shaw, even though made out of his presence, were in furtherance of the conspiracy and were competent evidence against him. The only question, then, is whether the conversers were properly and adequately identified as co-conspirators so as to make the monitored statements admissible. Hopkins saw several of the alleged co-conspirators enter the apartment where the transmitter operated, and he was familiar with most of the voices.[2] Moreover, Hopkins testified that

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[2] Appellant urges that the testimony of Hopkins should have been rejected **in toto** ("Your honor, we just don't think that he is qualified at all to testify") because, upon cross-examination, Hopkins admitted that he could not positively identify the participants by their voices alone. "Q. All right now, the only thing you did not recognize if you would hear one of them, one voice come over the radio, could you distinguish that and say who that was by the voice alone? A. Mr. McLean, I could recognize those boys' voices, but I would not be able to swear it was them."

Upon redirect examination he stated that he did have some knowledge of the voices of the various defendants and that he did use that knowledge in connecting them up with the names that were called, so that he was "satisfied in his own mind who was talking." It is clear that he was giving his best recollection, judgment and belief on the subject and that is all that is required.

he could identify the voices of the conversers by the fact that they spoke in response to questions put to them wherein their names were mentioned, and by the fact that he could easily recognize Watkins' voice and Watkins, in turn, could identify those persons to whom he spoke. In this manner the voices were identified as belonging to the conspirators whose statements were made in the course of and in furtherance of the alleged conspiracy. Consequently we hold that there was a sufficient connection established and the evidence was properly admissible.

The only other error assigned which we think requires discussion is based upon the trial Court's limitation of cross-examination of Watkins on a certain point and its comments upon this line of examination. In its zeal to

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The admissibility test with respect to this testimony was clearly satisfied. We quote the general rule from 20 Am. Jur. 639, Evidence, Sec. 768: "The law cannot reasonably require of a witness testifying at the trial of an action absolute certainty of observation or statement. . . . A witness who is uncertain as to either observation or recollection of a fact concerning which he is asked to testify may be permitted to give his testimony qualified by a phrase or phrases expressive of something less than a positive degree of assurance. Such qualification affects merely the probative force of the testimony . . ."

Words of similar import were used by the Supreme Court in **On Lee v. United States, supra,** pp. 757-8: "The trend of the law in recent years has been to turn away from rigid rules of incompetence in favor of admitting testimony and allowing the trier of fact to judge the weight to be given it . . . Today the tendency is to enlarge the domain of competency and to submit to the jury for their consideration as to the credibility of the witness those matters which heretofore were ruled sufficient to justify his exclusion . . .

"We think the administration of justice is better served if strategems such as we have here are regarded as raising, not questions of law, but issues of credibility."

attack the credibility of the government informer, the defense, after first bringing out the fact that Watkins was a convicted narcotics user, sought further to discredit him by attempting to show a possible motive to fabricate. Watkins was questioned on the matter of whether his brother was then in prison on a narcotics charge. When objection was made to this, it was explained that the purpose was to display a possible arrangement whereby Watkins, by helping the Government, might aid his brother. The Court sustained an objection to this line of cross-examination, and in so doing expressed its views that the Government would not be a party to such an arrangement.

It was proper that such far-fetched and speculative testimony be excluded; and the scope of cross-examination is within the sound discretion of the trial Court.[3] And a federal court may express its opinion even with respect to the facts if it is made clear to the jury that they need not be bound by this opinion.[4] Here, the Court stayed within the bounds of sound discretion both in limiting cross-examination, and commenting upon the facts. The jury was carefully, properly and repeatedly told in the Court's charges that they were the sole judges of the facts; and,

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[3] **Alford v. United States,** 1931, 282 U.S. 687; **Weiss v. United States,** 5 Cir., 1941, 122 F. 2d 675; **Natural Gas Co. v. Henley,** 5 Cir., 1931, 54 F. 2d 59.

[4] **Quercia v. United States,** 1933, 289 U.S. 466; **Simmons v. United States,** 1891, 142 U.S. 148; **Texarkana Bus Co. v. Baker,** 5 Cir., 1944, 142 F. 2d 491; **Pollard v. United States,** 5 Cir., 1919, 261 F. 336.

In the **Quercia** case, **supra,** the Supreme Court explained the Court's function in this respect: "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and determining the questions of law."

furthermore, they were told that it was upon them to judge the credibility of witnesses and the weight to be put upon testimony. Moreover, the remarks of the Court were made as one justification for exclusion of the proffered proof and did not relate to the facts upon which the jury was to base its verdict.

The appellant assigns and argues additional points, urging that they constitute reversible error. However, we find no merit in these. They are non-erroneous, harmless[5] or were not properly preserved for review and are not "plain errors or defects affecting substantial rights" so as to be noticeable on appeal under Rule 52(b), Federal Rules of Criminal Procedure. The record reflects that the appellant was given a fair trial, there was evidence upon which the jury could base a guilty verdict and we find no error justifying our setting the verdict aside. The judgment entered thereon is, therefore,

AFFIRMED.

A True Copy:
Teste:

.....
Clerk of the United States Court of
Appeals for the Fifth Circuit.

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[5] Rule 52(a) Federal Rules of Criminal Procedure.

APPENDIX B

Statute Involved

Title 1, U.S. Code.

"**Sec. 371. Conspiracy to commit offense or to defraud United States.** If two or more persons conspire either to commit any offense against the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined . . . or imprisoned . . ."

APPENDIX C

EVIDENCE AS TO COUNT I, THE CONSPIRACY COUNT

A. Overt act 1 (March, 1950)

Government witness Floyd Luke Watkins testified that in March, 1950, he was at 817 East Magnolia Street with defendants Reed and Pierce and others (R. 53-54). That defendant Lott gave marijuana to "Yank" [defendant Reed] who sold it to different people (R. 57-58), and told Yank he could get Yank morphine to sell (R. 58).

[Appellant's motion to withdraw alleged marijuana transactions from the jury's consideration, allowed (R. 575-576)].

B. Overt act 2 (April 1, 1950)

Watkins testified that on April 1, 1950, at 817 East Magnolia Street, he and defendants Shaw and Pierce were present when defendant Lott gave a bottle he said contained morphine to Yank Reed. That Lott said he would charge $1.50 for it and that Yank could get $3.00 (R. 58-59).

C. Overt act 3 (April 1, 1950)

Watkins testified that on April 1, 1950, at 817 East Magnolia Street, Lott gave Yank a package and told him it contained cocaine for Yank to give to his customers. That witness and those present "shot it" (R. 59).

D. Overt act 4 (April 17, 1951)

Watkins testified that on April 17, 1951, he and Yank Reed went to Lott's house for dope (R. 62). That witness

was arrested while waiting for Yank to come out, whereupon Yank was also arrested (R. 63-64). That Yank later told him that Johnnie got them out of jail (R. 67).

Government witness George Tate, a Fort Worth policeman, testified that on April 17, 1951, he arrested Yank Reed coming out of Lott's house (R. 142-143). On cross-examination, that Reed then told him that he had gone to see Lott to collect money owed to him (R. 147).

E. Overt act 5 (August 13, 1951)

Watkins testified that on August 13, 1951, Reed told him that Johnnie could not get any more dope and that Reed was going to San Antonio to get some (R. 69-70).

On cross-examination Watkins could not remember if he went to San Antonio on August 13, 1951, didn't think Yank went there, and doesn't know if Marshall Thomas Robert or defendant Shaw went there (R. 115-116).

Government witness Okla Johnson, a federal narcotic agent (R. 383) testified that he saw Reed and Shaw in San Antonio on August 13, 1951 (R. 384) and questioned Shaw (R. 466).

F. Overt act 6 (Early part of 1951)

Watkins testified that early in 1952 he and Larry Pierce bought pills from Lott, said by Lott to be pantopon (R. 70).

G. Overt act 7 (October 23, 1952)

Andrew Agathangelou, a federal narcotic agent (R. 303) testified that on October 23, 1952, defendant Pierce came to the Fort Worth Narcotic Office and said he would buy narcotics from defendant Lott; that Pierce was supplied with government funds and that witness and De-

tective Baker went to a place in Fort Worth but that nothing happened (R. 304-305). On cross-examination the witness stated that narcotic agent Johnson gave Pierce the money; that witness does not know whether a purchase was made or the money returned (R. 337).

Agent Okla Johnson testified that he first saw Pierce on October 23, 1952 (R. 384-385). [The witness' further testimony as to the events of that day was not admitted on the government's admission that a defense objection thereto "may be well made" (R. 386)].

H. Overt act 8 (January 21, 1953)

Government witness Watkins testified that on January 21, 1953, agents gave him money (R. 72-73). That he then met Larry, Yank and Betty Jean Beaver and asked Yank for dope (R. 73). That Yank said he would have to call Johnnie Lott, made a phone call, asked for Johnnie and told witness that Johnnie would call back. The phone rang, Yank spoke, left the house and returned. Witness gave him $55.00 for ten tablets which Yank said were dilaudid (R. 74).

Herbert Hopkins, a Fort Worth police officer testified that Watkins entered a house (R. 173-174). Reed left and returned. Watkins then left (R. 175). On January 22nd witness saw Government Exhibit 9 in Reed's billfold, a $5.00 bill furnished Watkins on January 21, 1953 (R. 188-190).

Agent Agathangelou testified that he followed Watkin's car (R. 305-307); that a person walked out of Terrell Street, entered a Chevrolet bearing Lott's license, which drove away (R. 308).

Orville Baker, a Fort Worth policeman, corroborated Agathangelou (R. 345-349).

Agent Johnson testified he gave Government Exhibit 9, a $5.00 bill, to Watkins as part of a sum of $55.00 (R. 387-389). Agent Johnson otherwise corroborated Hopkins.

I. Overt act 9 (January 26, 1953)

Witness Watkins testified that on January 26, 1953, he met the agents and officers (R. 74-75). That he went to Yank's house and asked Yank for dope; that Yank asked him for $12.00, saying he had $8.00 from Larry, had talked to Johnnie, and was going to make a connection for $60.00 (R. 75). That Yank answered the phone, got the $12.00, left, returned, and gave witness two pills (R. 75-76).

Officer Hopkins testified that he saw Reed leave the house and return (R. 178-179).

Agent Agathangelou testified that he saw Reed enter a car bearing Lott's license (R. 311-312).

Officer Baker corroborated Agathangelou (R. 351-353).

Agent Johnson supplied corroboration as to Reed's movements (R. 396-399).

J. Overt act 10 (February 9, 1953)

Watkins testified that on February 9, 1953, he asked Yank for stuff and Yank said he would have to call Johnnie Lott, used the phone, asked for Johnnie, and asked if he could get 65¢ worth of hot dogs, saying he would be there to get it (R. 78). Yank left, returned, and gave witness some pills for $65.00 (R. 78). He gave the pills to Johnson (R. 78).

Officer Hopkins testified that he saw Reed emerge from Terrell Street and enter a car driven by Lott (R. 179-182).

Agathangelou corroborated Hopkins (R. 312-314).

Agent Johnson testified that on February 9, 1953, after Watkins entered a house Larry Pierce arrived and departed (R. 401). That he saw Yank leave the house and return (R. 402-403). That Watkins then emerged and gave witness ten tablets (R. 405).

Chemist Spillman testified that Government Exhibit 18 was ten capsules of morphine sulphate, a narcotic drug (R. 492).

K. Overt act 11 (February 20, 1953)

Witness Watkins testified that he went to Yank's room and asked him for stuff (R. 78). Yank said Johnnie could only get pills and that witness could put his money in with Larry Pierce (R. 79). Yank and Larry left and returned and Yank handed pills to witness (R. 79).

Officer Hopkins testified he saw two colored boys wait near a point where he dropped Watkins, for a gray Chevrolet, and enter the Chevrolet (R. 193-194). That one of the boys left the Chevrolet and returned with a package (R. 194).

Agathangelou testified that he saw Watkins enter a house and saw defendants Pierce and Reed emerge later, enter a parked car, await and enter a Chevrolet (R. 315-316). That Pierce then got a package from the parked car; that Pierce and Reed then returned to the alley (R. 317). When the Chevrolet left he saw Lott driving it (R. 317-318).

Officer Baker corroborated Agathangelou (R. 353-356).

Agent Johnson said Watkins gave him a package containing four capsules, Government Exhibit 19 which contains four broken capsules and a brown powder (R. 408-409).

Chemist Spillman testified that government Exhibit 19 contains five broken capsules of morphine hydrochloride, a narcotic drug (R. 492).

L. Overt act 12 (March 10, 1953)

Watkins testified that on March 10, 1953, he saw Yank, Shaw, Pierce, and one Doris Jean (R. 80). That Yank told him he had no stuff but was liable to have some later; that witness went to the restroom and while there heard Lott's voice; that when he returned there was dope in a bottle on the bed (R. 80-81). Witness asked for some and Johnnie Lott said he wasn't buying enough; that Johnnie then gave Yank some pills and Yank gave them to witness who "shot it" and left (R. 81).

Officer Hopkins testified that he saw Lott enter 454 Cooper Street (R. 194-195). That 30 or 40 minutes later Lott left in a car (R. 196).

Officer Baker corroborated Hopkins (R. 358-359).

M. Overt act 13 (March 13, 1953)

Watkins testified that on March 13, 1953, he was equipped with a hidden radio transmitter. He went to Yank's room at 454 Crawford Street (R. 82-84). Doris Jean Miller told him Yank had gone "to make some stuff for Johnny Lott" (R. 85). That Yank came in and witness asked him if he could buy $35 worth of stuff. Witness gave Yank $35 for some pills, "shot" one, left, and gave agent Johnson the dope (R. 85).

Hopkins testified that on March 13, 1953, he was stationed with a radio to receive the signal from Watkins' set foth by ear phones and tape recorder (R. 199-200); that after Watkins went in an alley he began to hear conversation (R. 201).

• • •

[R. 201-232 relates to the government's attempt to adduce testimony from Hopkins regarding conversations transmitted by radio.

Objection was made that Hopkins' testimony would be nothing more than would be gleaned from listening to the tape recording—hence the recording would be the best evidence (R. 201-225); the attempt to play the recording, if any, for the jury was a failure (R. 224-226, 229). Hopkins testified he received the signal independent of the recording thereof (R. 227). The court thereupon decided, over objection, to permit Hopkins to relate what he heard using the ear phones (R. 226-227, 230). Defendant Lott thereupon objected to anything heard on the radio, both generally and on the grounds that the testimony was hearsay and was offered in order to prejudice Lott, and asked that the objection stand without continuous repetition. The court overruled the objection, letting it stand as to prospective testimony to avoid repetition (R. 253).]

• • •

Hopkins then testified on *voir dire* that he thought he could recognize individual voices—"they would call names" (R. 254). That he could recognize "those boys' voices, but I would not be able to swear it was them" (R. 254). Hopkins then continued upon direct examination, stating that the conversants were responsive to the names used in the conversation (R. 254) and that he used his knowledge of the defendants' voices with the names called (R. 256). Again on *voir dire* Hopkins testified that he had never heard any of the individuals in question via radio or loud speaker (R. 256) and that at the time of the conversations he wouldn't know who, or how many persons were present there (R. 256-257).

• • •

[The court then ruled as to the radio conversations that if the witness could recognize the voice of Reed, or if he recognized Watkins, and Watkins could identify the persons speaking to him, Watkins, then testimony by an auditor of the radioed conversations would be admissible (R. 257).]

• • •

Hopkins then testified that on March 13, 1953, Watkins called Yank by name and asked for $35 worth of stuff, and that he heard no other conversation (R. 259).

Agent Johnson testified that on March 13, 1953, Watkins went to 454 Crawford and later Yank arrived (R. 410-412). Watkins departed and handed Johnson four tablets, Gov't. Exhibit 20 (R. 413-414).

N. Overt act 14 (March 19, 1953)

Watkins testified that on March 19, 1953, wearing a radio transmittter, he met Yank, Doris Jean and Larry (R. 85-86); that he asked Yank for four tablets for $20 and Yank said it cost $7 apiece because the last stuff he got from Johnny Lott, he didn't "make but $11 and Johnny made all the profit" (R. 86); that he gave him $21 for three tablets, but a needle was stopped so witness gave the tablets to agent Johnson. That the tablets came from Doris Jean (R. 86).

Hopkins testified that on March 19, 1953, he listened via radio to Watkins' transaction (R. 264). That he heard Floyd and Larry talk about two pills for $10 (R. 264). That Floyd complained to Yank of the price and Yank replied he didn't care (R. 265). That he heard Floyd say "Johnny ain't going to whip you." That Yank said: "I know he ain't . . ."; Whereupon there was conversation about three for $21 and a needle's being stopped (R. 265).

Agent Johnson testified that on March 19, 1953, he saw Watkins go into and emerge from a house (R. 419-420). That Watkins gave him Government Exhibit 21, containing three broken tablets (R. 421-422).

O. Overt act 15 (April 17, 1953)

Watkins testified that on April 17, 1953, he asked Yank for medicine (R. 87). That Yank told him he could not have five tablets because "Johnny was out of town and he wouldn't have no more stuff until Johnny got back." That he got two pills for $100, left, and gave the pills to Johnson (R. 87-88).

Hopkins testified that via radio on April 17, 1953, he heard Reed tell Watkins that one Cavitt told him, that he, Cavitt, was unable to obtain coke or cocaine (R. 267). That Watkins asked Reed for five tablets of coke and "Reed said Johnny Lott had brought his supply earlier . . .". Floyd told Reed he would take two (R. 267).

Agent Agathangelou testified that on April 17th, he watched Watkins enter a house that Reed left and re-entered. (R. 319-321)

Agent Johnson corroborated Agathangelou (R. 428-429).

Chemist Spillman testified that Government Exhibit 22 consisted in two quarter grain tablets of morphine sulphate. (R. 493)

P. Overt act 16 (April 20, 1953)

Watkins testified that on April 20, 1953, he went to Yank's house, asked to buy a large dilaudid tablet for $30 (R. 88-89). Yank said that "Johnny Lott didn't bring him but one", but that if Johnny brought two he would let Watkins have it; that he asked Johnny if Yank did not buy it for $20 and sell it for $40, and Yank said he did,

that he made more money than Johnny did, (R. 89-90); that he gave Reed $20 for four chips, "fixed" two of them, and took two back to the agents (R. 90).

Hopkins testified that on April 20, he saw Watkins enter the premises occupied by Yank Reed (R. 219-220). That he heard via radio, a conversation in which Floyd stated that Reed gave Johnny Lott $20 for a pill, and Yank stated that he, Yank got $40 for it (R. 269).

Agathangelou testified that he saw Watkins enter and leave Reed's house (R. 323).

Q. Overt act 17 (April 22, 1953)

Watkins testified that on April 22, 1953, he went to Yank's house, and bought three pills for $15 (R. 90-91). That Joe Shaw, Yank, and Doris Jean were there; that Joe went out and returned with a bottle which he handed to Yank; that Yank gave him three pills (R. 91).

Hopkins testified that via radio on April 22, 1953, he heard a conversation between Reed and Watkins about when they were arrested at Johnny's house (R. 270) and heard Reed tell Watkins that "all these addicts got to use my pills now" (R. 271). He further heard a conversation where Reed told Joe Melvin "Joe cop the stash, Peppermint wants some medicine" (R. 271).

Agathangelou testified that he saw Watkins enter a house, saw Shaw emerge therefrom, take something from a rubbish pile and re-enter (R. 327).

Officer Baker corroborated Agathangelou (R. 357-358).

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 854

J. T. LOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A. 19–25; R. 669–675) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals (R. 676) was rendered on March 14, 1956, and the petition for a writ of certiorari was filed on April 12, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether there was sufficient identification of the speakers whom a police officer heard over a

radio receiver to permit the admissibility in evidence of statements made by them, as declarations by co-conspirators.

2. Whether the court properly acted within the bounds of its discretion when it limited the cross-examination of a government informant and explained its reasons therefor.

3. Whether the court committed prejudicial error in failing to withdraw an overt act from the jury's consideration and in charging with respect to proof of the overt acts.

STATEMENT

In an indictment returned in the United States District Court for the Northern District of Texas, petitioner and others were charged in count one of a five-count indictment with a conspiracy to violate narcotics laws.[1] Count one alleged seventeen overt acts occurring from about March 1950 to about April 1953 (R. 1–5). Petitioner was convicted and sentenced to a term of imprisonment for five years (R. 645, 647).[2]

The government's evidence was directed principally toward proof of the overt acts and may be summarized as follows:

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[1] The remaining four counts charged the defendants with substantive violations, with petitioner being named only in count four, which was dismissed prior to trial (R. 6–7, 10).

[2] Petitioner's first conviction was reversed on appeal (218 F. 2d 675) and the instant proceedings constitute the second trial.

Overt acts 2 and 3.[3] On April 1, 1950, in a house occupied by co-defendant Reed, in the rear of 817 E. Magnolia Street, Fort Worth, Texas, petitioner, in the presence of special government employee Watkins and co-conspirators Shaw and Pierce, sold to Reed a bottle which he said contained morphine. He charged Reed $1.50 for it and told him that he (Reed) in turn could resell it for $3.00. At the same time petitioner also gave Reed some cocaine "to just give it to his customers" and Shaw, Reed and Watkins used it (R. 58–59, 60).

Overt act 4. On April 17, 1951, Watkins and Reed were arrested by city police outside petitioner's home where Reed had gone to get dope. Both spent the night in jail and upon their release the following day Reed told Watkins that petitioner had them released (R. 62–67, 143). The court charged the jury that the conversation between Reed and Watkins was admitted only against Reed, unless there was other evidence showing the existence of the conspiracy; in that event the conversation would be admissible against all (R. 68–69).[4]

Overt act 5. On August 13, 1951, Reed told Watkins that petitioner could not get any more

[3] All of the evidence set forth in the subsequent paragraphs which dealt with co-conspirators' declarations, except where otherwise specified, came from the testimony of special government employee Watkins.

[4] Final instructions to the jury contained the usual and correct instructions on co-conspirators' declarations (R. 631).

dope and that he (Reed) would have to go to San Antonio to get some (R. 69–70). That same day, federal narcotics agent Johnson saw Reed and Shaw in San Antonio and questioned Shaw (R. 384, 466).

Overt act 6. Early in 1952, Pierce and Watkins went to petitioner's house and bought some pills from petitioner which he said contained pantopon (R. 70).

Overt act 7. One government agent testified that on October 23, 1952, co-defendant Pierce talked to federal narcotics officers and offered to buy narcotics from petitioner. He was supplied with government funds and driven to petitioner's house, but nothing further happened that night (R. 304–305, 337). When another agent was asked about the conversation with Pierce, defense counsel objected that the conversation was not in furtherance of the conspiracy. The prosecutor withdrew the question and there was no further evidence on this point (R. 384–386).

Overt act 8. On January 21, 1953, federal narcotics agents and city detectives met Watkins, who had been told earlier that month by Reed that he was likely to get some "stuff" (R. 71–72). The officers searched Watkins and his car, and gave him $55.00 to purchase the narcotics (R. 72–73, 173, 347–348). While under the surveillance of the agents and police officers (R. 174, 305–307, 348), Watkins drove to an apartment building on Terrell Street where he met Reed

and Pierce and asked Reed to sell him some dope (R. 73). Reed said that he would have to call petitioner. He did so and told Watkins that petitioner would call him back. Later the phone rang and Reed answered it (R. 74). Immediately thereafter Reed left the house, and was observed by the agents to enter a car belonging to petitioner which had just arrived, and to drive away in it (R. 74, 308, 348–349). He later retured to the house and sold Watkins what he (Reed) described as dilaudid tablets for $55.00 (R. 74, 174–175). Watkins left the apartment after using one tablet, returned to the surveilling officers and gave them nine tablets, which upon analysis were determined to contain dilaudid hydrochloride (R. 74, 175, 308–309, 349–350, 391–395, 491–492).

The following day, on January 22, a five-dollar bill from the $55.00 given by federal officers to Watkins was found in Reed's possession while he was in city police custody, apparently on another matter (R. 184–186, 190, 388–389).

Overt act 9. On January 26, 1953, Watkins met the same surveilling officers again (R. 74–75, 177). The officers searched Watkins and his car and gave him some money (R. 75, 178, 310). While under surveillance, Watkins drove to Reed's Terrell Street apartment and entered it (R. 75, 178). There he asked Reed for some dope and Reed replied that "It will be after awhile" and asked Watkins to drive him to a

drugstore for an eye dropper and a hypodermic needle (R. 75). Both left the house (R. 75, 178) and on their way to the drugstore Reed asked Watkins to give him $12.00, saying that Pierce had already paid him $8.00 and that he (Reed) had already talked to petitioner and "he was going to make a connection for sixty dollars" (R. 75). Both returned to the house (R. 75, 118). The telephone rang, Reed answered it, received the $12.00 from Watkins and left the house (R. 75, 179, 311). He was seen entering petitioner's car which had just arrived and also seen driving away in it (R. 311, 352–353). Later Reed returned to the apartment house (R. 76, 179, 379) and gave Watkins two pills (R. 76). Watkins returned to the surveilling officers and gave them the two pills, which upon analysis were found to contain morphine sulphate (R. 76, 179, 353, 397–398, 492).

Overt act 10. On February 9, 1953, Watkins met the same surveilling agents, was searched, given some money and went again to the Terrell Street building (R. 77–78, 177–178, 312, 400–401). Inside, when Watkins asked Reed for some "stuff", Reed said that he would have to call petitioner. Using the telephone he asked for petitioner and then said that he would like "sixty-five cents worth of hot dogs" and that "By the time you can get it wrapped up I will be up there to get it" (R. 78). Reed left the house and was seen to enter petitioner's car driven by petitioner

(R. 78, 180–181, 313–314). Later Reed returned to the house (R. 78, 403) and sold pills to Watkins for $65.00 (R. 78). Watkins then returned to the surveilling agents and turned ten tablets over to them which upon analysis were found to contain morphine sulphate (R. 78, 403–404, 492).

Overt act 11. On February 20, 1953, Watkins again met the same surveilling agents, was searched and given money, and went to Reed's Crawford Street alley room (R. 78, 192–193, 314–315, 353–355, 406). He asked Reed for some "stuff". Reed told him that petitioner could not get anything except pills and asked how much Watkins wanted. Watkins said that he had $35.00. Reed left the room and upon his return said that petitioner would bring the "stuff" on his way to work. He asked Watkins "to put in" his money with Pierce who was also there (R. 78–79). Thereafter Pierce and Reed left the house and entered a parked car and waited. Shortly thereafter when petitioner's car driven by him parked nearby, they were observed to enter petitioner's car, leave after a few minutes and return to Reed's quarters (R. 79, 193–194, 316–317, 318, 319, 355–356, 407–408). There Reed gave Watkins some capsules, which Watkins upon returning to the surveilling agents gave them (R. 79, 408–409). Upon analysis these capsules were found to contain morphine hydrochloride (R. 492).

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Overt act 12. On March 10, 1953, Watkins went to Reed's Crawford Street room and asked Reed for some "stuff" but Reed said he did not have any but would have some later. Thereafter Watkins went into the restroom and while he was in there, he heard petitioner's voice (R. 80). In the meantime, surveilling agents, who were observing Reed's room, saw petitioner arrive and drive into an alley where Reed lived (R. 195–196, 358–359).

When Watkins returned from the restroom he saw some tablets in a bottle lying on the bed and asked for some. Petitioner said that Watkins was not buying enough, but Reed finally gave some to Watkins who used them immediately (R. 80–81).

Overt act 13. On March 13, 1953, Watkins was equipped by the surveilling officers with a hidden radio transmitter, searched and given money (R. 81–82, 196–197, 410–411). He again went to Reed's Crawford Street room (R. 84, 411). City Detective Hopkins was stationed in a firehouse a half a block away (R. 82) to monitor any broadcast that came from Watkins' transmitter (R. 198–199). From this point of observation, Hopkins could also observe persons in the alley leading to Reed's room (see R. 193, 198–199, 200).

When Watkins entered Reed's room, Doris J. Miller, who was there, told Watkins that Reed "has gone to make some stuff for" petitioner (R. 85). When Reed returned, Watkins asked

him for $35.00 worth of stuff and Reed sold it to him (R. 85, 412). Hopkins heard Reed's conversation with Watkins over his receiver (R. 259). Watkins thereupon returned to the surveilling agents and turned over his purchase to them (R. 85, 413–414). Upon analysis the purchase was found to contain morphine sulphate tablets (R. 493).

Overt act 14. On March 19, 1953, the surveilling agents again equipped Watkins with a radio transmitter, searched him, and furnished him money (R. 85–86, 264, 416). Watkins then went to Reed's Crawford Street room. After a discussion with Reed about the price of "stuff" to Watkins, Reed told Watkins that on the last amount he had purchased from petitioner he (Reed) had made only $11.00 and petitioner made all the profit. Thereupon Reed sold him three tablets for $21.00. Watkins attempted to use some but the needle was not working (R. 86). After Watkins left Reed's room, he turned over the tablets to the surveilling agents (R. 86, 420–422). Upon analysis the tablets were found to contain morphine sulphate (R. 493).

Detective Hopkins testified that he heard Watkins and Reed bargain over the price of the drug and that Watkins said to Reed "Johnny [petitioner] ain't going to whip you." Reed replied "I know he ain't. I am going to deal him in, I am going to get his money, * * *." He heard Watkins finally succeed in obtaining three tab-

lets for $21.00 and heard some conversation about the needle being stopped up (R. 264–265).

Overt act 15. On April 17, 1953, Watkins was again equipped by the surveilling agents with a radio transmitter, searched, and furnished money (R. 87, 319–320, 428). After arriving at Reed's then Center Street apartment (R. 87, 320, 429), Watkins asked Reed if he could get some "medicine" and Reed said "Yes". When Watkins asked for five tablets, Reed refused saying that petitioner was out of town and Reed could not get more until petitioner returned. Accordingly, Reed sold Watkins two tablets for $10.00 (R. 87). Watkins then returned to the surveilling agents, and gave them the tablets, which upon analysis were found to contain morphine sulphate (R. 87, 321, 429–432, 493).

Watkins' testimony as to his conversations with Reed was corroborated by Detective Hopkins in his testimony as to what he heard over the receiver (R. 267). Hopkins monitored this conversation in an empty house directly across from where Reed lived at that time (R. 266).

Overt act 16. On April 20, 1953, Watkins, similarly equipped, searched and furnished money, went to Reed's Center Street living quarters again (R. 89, 219–220, 321–323). Watkins asked Reed for some "stuff". Reed said he had a football (dilaudid tablet), but he could not sell it to him since he had only one left, that petitioner had only brought him one, and that if petitioner

brought him two, he would let Watkins have one. Watkins asked Reed if he did not buy them for twenty dollars and resell for forty dollars. When Reed replied "Yes", Watkins said that Reed made more money than petitioner and Reed replied that he did. Reed finally sold Watkins four chips off the tablet for $20.00. Watkins used two and turned the other two to the surveilling agents (R. 89–90, 323–325). Upon analysis the chips were found to contain dilaudid hydrochloride (R. 491). Detective Hopkins' testimony concerning the monitored conversation on that date corroborated Watkins' testimony thereon (R. 269).

Overt act 17. On April 22, 1953, Watkins was again similarly equipped, searched and furnished with money as on the foregoing days and then went to Reed's home (R. 90, 270, 326). When he asked Reed to buy dope, Reed agreed to sell him some. Watkins requested four tablets for $15.00 but Reed said that he could only get three for that price. Reed then told Shaw "Cop the stach. 'Peppermint wants some medicine'," meaning "Go outdoors, and get the dope [for Watkins]". Shaw went out, returned with a little bottle from which Reed gave Watkins three tablets which Reed described as morphine. Watkins used one, left and returned to the surveilling agents. He gave them the tablets (R. 91, 327–329, 357–358). Upon analysis the tablets were

found to contain morphine sulphate (R. 491). Detective Hopkins' testimony as to the monitored conversation on that date corroborated that of Watkins (R. 271).

In none of the described sales were any federal tax stamps affixed to the receptacles containing the narcotics nor were the requisite Treasury forms presented (R. 92, 476–477).

Detective Hopkins also testified concerning conversations which he monitored on March 17 and March 18, 1953, and concerning the defendants' activities on those dates on which no overt acts were alleged (R. 221–222). He testified that on March 17, 1953, Watkins, after being searched and equipped with a radio transmitter, went to Reed's Crawford Street room (R. 233); and that, while Watkins was there, Hopkins heard Reed, after discussing the sale of narcotics to Watkins, say to Watkins "Johnny Lott would be at his house 10:00 p. m. sharp" and emphasized again, "10:00 p. m. sharp, on his way to work" (R. 232–233, 260).

As to March 18, 1953, Hopkins testified that Watkins, again equipped with the radio transmitter, went to Reed's room (R. 233–234). While Watkins was there, Hopkins testified that he heard Watkins ask Reed for narcotics and heard Reed explain the difficulty in getting more but that "he" (apparently referring to petitioner) will always have some; that Reed said: "I have got ten pills. Johnny is going to con-

neet me tonight. * * * Johnny is supposed to bring it back when he comes by to pick up his money" (R. 261–262); and that there followed a discussion between Watkins and Reed as to how much Johnny received from Reed for narcotics (R. 263).

In April, 1953, a Fort Worth City Detective, while investigating a matter unrelated to federal narcotics and not in cooperation with federal officers, entered Pierce's room without a search or arrest warrant, by knocking on his door and being allowed to come in (R. 150, 151–158). A search of Pierce and his room revealed an eye dropper, a hypodermic needle and tablets (R. 158–160, 241–249). The tablets were found to contain morphine sulphate (R. 490–491).

In executing an arrest warrant covering Reed, federal officers in October 1953 searched Reed and his room (R. 329–332, 433–436). The officers found a hypodermic needle outfit in the room (R. 333–334) and some white powder which was found to contain heroin hydrochloride (R. 435, 436–437, 493–494).

Federal narcotics agents arrested petitioner in October 1953 pursuant to a warrant of arrest (R. 271–272, 437–438). A search of petitioner's bedroom revealed a box of empty gelatin capsules. On the reverse of the box was a note to call Reed. The officers also found a paper on which a notation was written to call Reed (R. 272–273, 438–439).

Petitioner denied any connection whatsoever with the conspiracy or any narcotics dealings with anyone (R. 549–550). He said that he knew Reed, Shaw and Pierce, but that his sole dealings with them were in connection with his employment of them at various times on his farm (R. 533–534, 545, 549, 552–553); that he did not know that they used drugs (R. 554). He did not deny being in the area as the government sought to prove, but testified that he frequently picked up Reed and took him to his farm (R. 557). He said that he first met Watkins at the commencement of the trial of this case (R. 558).

The building in the rear of 817 E. Magnolia Street which Watkins testified (in support of overt acts 2 and 3) that he visited was not built until 1951 (R. 505–510), but in 1950 there was a garage in the rear and a "frame" of the building that was finally completed (R. 506).

The night jailer where Watkins was held in protective custody prior to the trial testified (with Watkins denying such conversations (R. 515–516)) that Watkins told him a few days prior to the trial that, regardless of the consequences to him, he was going to change his testimony about his three "buddies" against whom he had testified in the first trial and that this time he would tell the truth (R. 517–518); and that a few days later when he asked Watkins whether he told "the boys" what he was going to do, Watkins replied that he "was saving that for a surprise" (R.

519). He also said that Watkins told him that two men named Johnson and Agathangelou (the federal narcotics agents involved here) paid Watkins (R. 526).

While in jail, Watkins wrote a letter to Pierce suggesting that he might be able to have the "D. A. * * * cut you [Pierce] loose" (R. 133–134).

ARGUMENT

1. Petitioner contends (Pet. 7–10) that the testimony of Detective Hopkins as to what he heard in the monitored conversations was hearsay because he could not sufficiently identify the participants as being co-conspirators whose declarations would be in furtherance of the conspiracy.

Before the Hopkins' testimony concerning the monitored conversations was admitted,[5] defense counsel asked him whether he could distinguish who spoke over the radio by the voice "alone". Hopkins replied "I could recognize those boys' voices but I would not be able to swear it was them" (R. 254). Upon further examination

[5] Prior to the introduction into evidence of Detective Hopkins' testimony concerning the conversations which he heard in monitoring the radio transmitter with which Watkins was equipped, the government sought to introduce the monitored conversations as tape recorded (R. 215, 218–220). The recording was played and was found to be unintelligible. Hence, the court decided that the recording was not the best evidence (R. 224–225) and that Hopkins should be allowed to testify as to what he heard on his receiver when monitoring and on which he made notes (R. 230, see R. 252).

Hopkins testified that he was "satisfied in my [his] own mind who was talking" (R. 256), basing his conclusion on the facts that he recognized Watkins' voice "beyond any question", that he was familiar with most of the voices, and that the conversations were in response to names called immediately before or after the conversation (R. 254–256). He also said that he did not know "every time" who was in Reed's living quarters at that time, but it is evident from the record that Hopkins was stationed near enough during the monitoring to observe persons coming and going near Reed's place of abode. The court thereupon, over petitioner's objection, admitted the monitored conversations heard by Hopkins (R. 257–258), ruling that the testimony was admissible if Hopkins recognized the voice of the person speaking, or if he recognized the voice of Watkins and Watkins could identify the one who was with him.

Petitioner argues that the latter part of the ruling permitted Watkins to corroborate himself. In his actual testimony, however, Hopkins was positive in his identification of the participants he overheard (R. 260–271) so that it was unnecessary to rely upon the testimony of Watkins alone as to who the speaker was. And, in any event, the testimony of Hopkins as to the actual words of the conversation was sound corroboration of Watkins, not dependent on the latter's credibility. The monitored conversations were

therefore properly admitted in evidence, with issues of credibility left to the jury. *On Lee* v. *United States*, 343 U. S. 747, 757–758.[6] Here, because of Hopkins' extensive analysis of how he recognized the voices, the jury was, in reality, in a better position than in most cases to determine the accuracy of the identification.

2. During cross-examination, Watkins was asked concerning his brother who was in a government penal institution in Seagoville, Georgia, for a marihuana conviction. When the government objected to such examination as being irrelevant, defense counsel said that he was attempting to impeach Watkins' credibility by showing that Watkins, by helping the government with his testimony, might help himself and his brother (R. 109–111). The court sustained the government's objection to the cross-examination, saying (R. 111):

> Well, the only way that he would aid his brother is to give testimony that would be helpful to the government, and if it was untrue the government would be a party to it. * * *
>
> I don't think the government, truly speaking, is under any obligation to this man that would cause them to show a different consideration to a prisoner, even though he was his brother. * * *
>
> Maybe I hold my government too high, but that is the way I look at it.

[6] Petitioner does not question the holding in *On Lee* (see Pet. 10).

> The court also instructed the jury that the "fact that a witness' brother may be in a federal prison may not be considered as bearing or having weight on his testimony with reference to giving it greater force or less, in this trial." (R. 113–114).

Petitioner contends (R. 110–112) that by this action the court guaranteed the veracity of a witness and thereby deprived petitioner of a fair trial by jury. That conclusion is without merit. In limiting the cross-examination of Watkins, the court kept within the bounds of its general discretionary right to limit the extent of cross-examination. Cf. *District of Columbia* v. *Clawans,* 300 U. S. 617, 632; *Alford* v. *United States,* 282 U. S. 687, 694. Its remarks were merely an explanation for its action in sustaining the objection. Considerable ingenuity is required to interpret them as an opinion on the veracity of Watkins. Further, at the conclusion of the trial, the jury was repeatedly instructed that they were sole judges of the facts and evidence (R. 629, 630), that they exercised the exclusive function of passing upon the credibility of witnesses (R. 629), and that the court was only the judge of the law (R. 630).

3. Petitioner challenges (Pet. 15–18) the trial court's charge that it was (R. 631–632) "not necessary for the government to prove all of the 17 overt acts, but if the government proves one of

them * * * it will be sufficient to support a conviction." He does not question the validity of this statement as an abstract matter, but argues that certain overt acts should have been withdrawn from the jury because of the absence or deficiency of proof.

Actually, the consideration of overt act 1, which is one of those under which there was allegedly insufficient evidence, was withdrawn from the jury (Pet. App. C. 27; R. 575–576). We agree with petitioner that overt act 7 should also have been withdrawn and that the first testimony about the Pierce conversation with the agents (see Statement, *supra,* p. 4; Pet. 12–14) should have been stricken for the some reason that further questioning about it was discontinued, *i. e.* that the conversation was not in furtherance of the conspiracy (see Statement, *supra,* p. 4). However, in the face of the overwhelming evidence in this record, the one short reference to this overt act, which was never thereafter pursued, was clearly harmless error. Petitioner's attempt (Pet. 14) to give significance to this particular testimony is based on his argument that the testimony of the monitored conversations had no probative value, an argument which as we have shown (*supra,* pp. 15–17) is fallacious.

Petitioner's part in the conspiracy was shown, not only by the testimony of informant Watkins and the references to him by other conspirators

overheard by Detective Hopkins, but also by his observed presence with the other conspirators in a way which connected him with that testimony—a presence which petitioner admitted and attempted to explain, but which the jury had good reason for disbelieving. As to all fifteen other overt acts (other than 1 and 7), there was, as shown in the Statement, *supra,* pp. 3–12, sufficient evidence to submit all of them to the jury although undoubtedly the evidence as to some was stronger than as to others. It certainly cannot be assumed that the jury would have based its verdict on the overt acts as to which the testimony was weakest and discredited those as to which the proof was strongest. The evidence as a whole was more than ample to support the verdict.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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